

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES, et al.,)	
)	
Plaintiffs,)	
v.)	No. 1:23-cv-00108-LMB-JFA
)	
GOOGLE LLC,)	
)	
Defendant.)	

**JOINT MOTION FOR LEAVE TO USE LOG-LEVEL DATA
PRODUCED BY THIRD-PARTY PUBMATIC, INC.
AFTER THE CLOSE OF FACT DISCOVERY**

On August 31, outside counsel for third-party subpoena recipient PubMatic, Inc., (“PubMatic”) informed Plaintiffs’ counsel that due to the size, complexity, and required engineering effort to process, upload, and transfer log-level data that is expected to be at the very least many terabytes in size from PubMatic’s display advertising exchange product, PubMatic believed that it was not likely that it would be able to complete the processing, upload, and transfer process of the full data set by the close of fact discovery on September 8. Despite PubMatic’s efforts to meet the fact discovery deadline, PubMatic is unlikely to be able to make a full production by that date. As such, the parties jointly move the Court to permit use of PubMatic’s late produced log-level data set.

In response to a Rule 45 subpoena from Plaintiffs to PubMatic served on the first day of fact discovery, March 27, 2023, PubMatic collected a sample of log-level data from its exchange product from June 2023. Pubmatic has represented that the data it is producing is data at the individual impression level that provides transaction-by-transaction information about *inter alia* individual impressions available from website publishers, bidders, bids, and the auction’s winning bid.

Since collecting exchange log-level data in June, PubMatic has worked to process and make it available to both parties in a timely manner. Given the size of the data set and engineering resources required, PubMatic now believes that it will not be able to make that production by the close of fact discovery. Since the data was collected, Plaintiffs' counsel has actively negotiated with counsel for PubMatic to get the log-level data set produced promptly and without undue burden. Counsel for PubMatic told Plaintiffs' counsel that PubMatic began final processing of the log-level data set in direct preparation for uploading the production on August 25, a full two weeks prior to the fact discovery deadline.

Google did not request these data from PubMatic but does not oppose the relief sought here, provided the production does not affect the deadlines for expert reports.

The parties submit that good cause exists to receive and use this data that will be produced after September 8, 2023. Generally, when a party seeks to modify the scheduling order, the Court must consider whether there is any "danger of prejudice to the non-moving party, the length of delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith." *Roe v. Howard*, No. 1:16-cv-562, 2017 U.S. Dist. LEXIS 187258, *1-2 (E.D. Va. June 30, 2017). Furthermore, a showing of "good cause" to modify the scheduling order "requires 'the party seeking relief [to] show that the deadlines cannot reasonably be met despite the party's diligence.'" *Cook v. Howard*, 484 Fed. Appx. 805, 815 (4th Cir. 2012) (unpublished per curiam) (citations omitted); *accord* Fed. R. Civ. P. 16, 1983 Adv. Comm. Notes (the movant must show that the current deadlines "cannot reasonably be met despite the diligence of the party seeking" the modification). Good cause under this test is easily shown.

Each of the good cause factors favors permitting use of PubMatic's log-level data if it is produced after September 8. First, there will be no prejudice to another party. Second, PubMatic is working to produce the data as close to the close of fact discovery as possible and the production of the data will not impede the rest of the schedule. Third, the delay has resulted from the size and complexity of the data. Finally, Plaintiffs have diligently pursued this discovery. PubMatic was served a subpoena in time to begin collection of data and processing well before September 8. Accordingly, good cause exists to allow these data to be used when it is produced after September 8.

* * *

Plaintiffs and Google request that the Court grant this joint motion for the reasons set forth above and to order that both parties may use PubMatic's log-level data for all purposes as if it had been produced on or before September 8, 2023. *See U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) ("We afford substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of that discretion.").

Dated: September 1, 2023

Respectfully submitted,

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